IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

Aaron Maurice Mylan,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 22-1-00353-18

BRIEF OF RESPONDENT

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SERVICE	
Peter B. Tiller Po Box 58 Centralia, Wa 98531-0058 **ptiller@tillerlaw.com**	Service was electronic, or if no email address appears at left, via U.S. Mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 28, 2023, Port Orchard, WA **Original to Court of Appeals; Copy as listed at left.**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mylan was charged with hate crime under RCW 9A.36.080 on probable cause to believe he had threatened another based on race or national origin. CP 1-5. Before trial, a first amended information charged the hate crime as count I and added a second count of harassment, a felony by the allegation of a threat to kill. CP 11-12.

Pretrial, the state raised the issue of the admissibility 911

calls recorded during the incident. CP 14 (caller Berkompas transcription CP 23-27), CP 29 (caller Siva transcription CP 38-41; audio tapes in the record as exhibit 1). The trial court listened to the tapes. RP 55.[1] Finding a hearsay exception (RP 63) and no confrontation violation, the trial court ruled that the 911 calls were admissible. RP 65-66. The calls were admitted and published to the jury. RP 287-89.

A CrR 3.5 hearing was had before trial. RP 4 *et seq.* Evidence and rulings in the 3.5 hearing are briefed just below at II., A., 1.

The state advised the trial court that it intended to offer and publish portions of body cam footage from the arresting officer, Bremerton Police Officer Chesney. RP 66. Thereon, Mylan can be heard speaking about having "been incarcerated half my life" and that he is "institutionalized." Id. The trial court viewed

[1] The first two volumes of the report of proceedings, containing pretrial and trial records, are sequentially paginated and are referred to as "RP."

excerpt. RP 68-69 (exhibit 3). With no objection from Mylan, the trial court admitted the excerpt. RP 72.

Mylan was acquitted of the hate crime charge. CP 141. He was convicted of the felony harassment charge. CP 142.

Mylan was sentenced to 55 months in custody. CP 165. The judgment and sentence recites that his offender score is 11 but the state conceded one point at sentencing. RP, 7/1/22, 3-4. The trial court proceeded with a 10. RP, 7/1/22, 11-12. But a score of 11 remains on the judgment and sentence. CP 164.

Mylan timely filed a notice of appeal. CP 176.

1. CrR 3.5 Hearing

Mylan was seen by a police officer, Corporal Ejde, some distance from the incident and seemed to wave at the officer as he approached. RP 8-9. The officer alighted his car and asked Mylan what was going on. RP 9. Mylan responded by describing having gone in a gas station with no shirt on and wearing a backpack and that the clerk there had been unhappy

about that. RP 10.

More officers arrived. RP 10. The initial officer gave Mylan no order and, on the information he had, would have let Mylan walk away to avoid a confrontation. RP 12. Corporal Edje was unable to establish probable cause to arrest Mylan. The Corporal knew only that an incident had occurred, a "threat" detail, and that Mylan met the rough description provided. RP 12, 14. He awaited Officer Chesney, "[b]ecause he had the information, the detail." RP 16. Bremerton Police Officer Chesney arrived, conversed with, and arrested Mylan. RP 13. Until the point of arrest, Mylan was not advised of his procedural rights. RP 13.

While the exchange with the initial officer occurred, Officer Chesney, who had spoken to the victim store clerks, brought one of the clerks to where Mylan had been contacted. RP 22. The clerk identified Mylan. Id. Officer Chesney approached Mylan—Mylan was not restrained and three officers

were standing eight to ten feet away from him. RP 22-23.

Officer Chesney recounted the report to Mylan and asked him if the report was accurate. RP 23. Mylan agreed, adding more detail to the story. RP 23-24. Officer Chesney asked about the using of "some racial slurs" and Mylan answered by telling of his time in prison where he knew minority people. RP 24. Officer Chesney testified that these discussions were investigative efforts; he was "trying to get more information and try and sort it out." RP 24-25.

Soon (seven to eight minutes (RP 28)), Mylan was arrested at which point Officer Chesney read him *Miranda*[2] warnings. RP 26. Asked why Mylan was not read his rights before the initial conversation, Officer Chesney said:

> I didn't feel like it was a custodial interview. We didn't detain him. We didn't control his movements. He had approached Corporal Ejde seemingly wanting to talk to him about the incident. It seemed like he had initiated that contact.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

RP 27. Mylan objected to the admissibility of his pre-*Miranda* statements to Officer Chesney. RP 34-35.

The trial court found that Mylan had hailed the initial officer. RP 37-38. The short conversation between Mylan and Corporal Ejde involved no visible coercion or commands and Corporal Ejde would have let him walk away. RP 38. Again, with the initial contact with Officer Chesney, Mylan was not restrained or ordered to remain; he was free to go. RP 39 (the record has part of the interaction on exhibit 2)

The trial court concluded that *Miranda* was not required because Mylan was not arrested when he spoke; he freely and voluntarily engaged conversation with the officers. RP 40-41.

B. FACTS

At trial, the state laid foundation for and offered the two 911 calls. RP 282 *et seq* (state's exhibit 1 offered at RP 287; published at RP 289). Mylan lodged no objection to foundation, offer, or publication. Id.

The first caller, Mr. Berkompas, reported Mylan as "antagonizing me and my coworker." CP 23. He described yelling and said "we felt threatened, so we call the cops." CP 24. Mylan was "yelling racist things at us." Id. Mylan was "extremely aggressive with his word." Id. Mr. Berkompas reported that the incident started when Mylan wanted to use the restroom but was told to wait because a woman, Ms. Ashley Siva (the second 911 caller), was already in the restroom. CP 25.

The transcription of the tape, captured Mylan in the background yelling "fuck you" and "shut the fuck up." E.g, CP 25. At one point, Mylan can be heard banging on things in the store and yelling "Full of shit. I'm knock you out. I'll knock any of you out." CP 25. These remarks are heard on playing state's exhibit 1.

Ms. Siva reported to 911 that she was in the bathroom of the gas station and "there is a huge argument going on and I'm

hearing people threatening to kill." CP 38. The men where "screaming at one another." CP 39. She was "not sure to go out there." Id. Ms. Siva reported that a store clerk tried to kick a guy out and the guy was "threatening to kill him." Id.

Reporting Bremerton Police Officer Chesney contacted the store clerks. RP 293. Clerk David Hamilton-Ross "seemed frightened, nervous, yeah. A little bit worked up, like upset like something had -- something traumatic had occurred to him. He seemed pretty upset." Id. Officer Chesney was told that another officer had contact with Mylan. RP 294. He took one of the clerks to that location and the clerk identified Mylan. RP 295. Mylan was cooperative but appeared to be "worked up, agitated and speaking very rapidly." Id.

The state offered Officer Chesney bodycam footage of his contact with Mylan. RP 297. It was admitted and published without objection. Id. Thereon, the demeanor described by Officer Chesney is seen. (state's exhibit 2.) There, Mylan, not

in custody, is seen speaking freely of having just gotten out of jail, having been there before, and being unafraid about going back.

Mr. Hamilton-Ross explained that the incident began when Mylan wanted to use the bathroom but was told someone was using it and that he would have to wait. RP 304. Mylan continued toward the bathroom and tried to go in. Id. The clerk told him he would have to wait and Mylan "started arguing with me immediately." RP 305.

Mr. Hamilton-Ross testified that he was engaged in a "big shouting match" with Mylan. RP 306. Mylan stood just in front of him and, among other things, said "Fuck you, you nigger. I'll kill you. I just got out of jail I'm not scared to go back. I'll kill you right now." Id. This threat caused Mr. Hamilton-Ross' coworker to call 911 and Hamilton-Ross to push his "panic button." Id.

The threats to kill were repeated "[d]ozens of times"

along with "I'm not scared to go back to jail." RP 307. Mr. Hamilton-Ross "started to get really scared." Id. Then, after leaving, Mylan returned doing "laps around the store" banging on things and yelling that he would kill Mr. Hamilton-Ross, his co-worker, and others present. RP 309. Now, Mr. Hamilton-Ross ""didn't feel safe anymore, and I knew he was coming for me." RP 311. Mylan seemed angry enough to hurt or kill Mr. Hamilton-Ross. RP 312.

III. ARGUMENT

A. THE STATE CONCEDES THAT WRITTEN CRR 3.5 FINDINGS MUST BE ENTERED BUT THE RECORD IS SUFFICIENT FOR REVIEW AND THE TRIAL COURT CORRECTLY RULED THAT MYLAN'S NONCUSTODIAL STATEMENTS WERE ADMISSIBLE.

Mylan claims that his statements to police were involuntary because he was subject to custodial interrogation before being read his rights. The issue turns on whether or not Mylan was in custody at the time he conversed with police at the

scene of his subsequent arrest. The trial court correctly ruled that Mylan was not in custody, Mylan's statements were voluntary, and *Miranda* warnings were therefore unnecessary.

1. The case should be remanded for entry of written findings and conclusions as required by CrR 3.5(c) but the record is sufficient to allow review of the trial court's ruling.

First, the state concedes that the matter should be remanded for entry of the findings of fact and conclusions of law required by CrR 3.5(c). But unless the appellant can show prejudice, the matter may be reviewed if the trial court's oral rulings are sufficient to permit review. *See State v. Glenn,* 140 Wn. App. 627, 639, 166 P.3d 1235 (2007). Here, Mylan does not claim prejudice on review from the absence of findings.

2. The trial court correctly ruled that Mylan's statements to police were noncustodial and admissible.

The United States Constitution amendment V. protects against compelled self-incrimination.[3] *State v. Escalante*, 195

[3] Self-incrimination protection under Washington Constitution article 1, section 9 is coextensive and not broader than the Fifth

Wn.2d 526, 461 P.3d 1183 (2020)(En Banc). Thus,

> "In *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)], the United States Supreme Court recognized that an individual interrogated while in custody is subjected to inherently compelling pressures "which work to undermine the individual's will to resist."

Escalante, 195 Wn.2d at 532 (alteration added). Issues regarding whether the person was "in custody" are issues of law that are reviewed de novo. *Escalante*, 195 Wn.2d at 531.

"The Fifth Amendment protects an individual's right to remain silent, in and out of court, unless he chooses to speak in the unfettered exercise of his own will." *Escalante,* 195 Wn.2d at 532 (internal quotation omitted) *quoting Malloy v. Hogan,* 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The present record reflects, as the trial court found, that Mylan chose to speak in the unfettered exercise of his own free will.

The question is whether "a suspect's freedom of action is

Amendment. *See State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

curtailed to a 'degree associated with formal arrest.' " *Escalante,* 195 Wn.2d at 533, *quoting Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Further,

> even if a person is "seized" within the meaning of the Fourth Amendment—such that a reasonable person in their position would not feel free to leave or otherwise terminate the encounter with law enforcement—they are not necessarily in "custody" for *Miranda* purposes.

Escalante, 195 Wn.2d at 533. The test is objective, asking "whether a reasonable person in the suspect's position would feel restrained to the degree associated with formal arrest." 195 Wn.2d at 533-34. All the circumstances are examined; particularly relevant circumstances are

> the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning.

Escalante, 195 Wn.2d at 534. The officer's subjective views are irrelevant, except if "those views are communicated to the suspect in some way and would influence a reasonable person's perception of the situation." Id.

Mylan was not stopped or otherwise detained by Corporal Edje. Mylan hailed the corporal (RP 8) and the ensuing conversation occurred in a public setting. *See* Exhibit 2. Corporal Edje in no way restrained Mylan; he was not frisked or ordered to remain in any particular location. RP 11-12. These circumstances did not change upon the arrival of Officer Chesney. Mylan still stood where he chose in the road, in public, unrestrained, unordered, and un-frisked. The comportment of the police during the conversations with Mylan was unaggressive; no lights flashing or guns drawn. A reasonable person under these circumstances would not believe that she was restrained "to a degree associated with formal arrest."

Mylan argues that he was not free to leave during his initial encounter with Corporal Edje. Brief at 21-23. Mylan asserts that Corporal Edje had probable cause to arrest. Id. The record shows, however, that the corporal lacked probable cause. Officer Chesney knew of the victim's identification of Mylan, not Corporal Edje. The Corporal would have had to arrest Mylan

on a hunch that there was an illegal threat and a guess that the person that had hailed him was the correct suspect.

Moreover, all that said, the Washington Supreme Court has acknowledged that *Berkemer v. McCarty,* as quoted above, "rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone." *State v. Short,* 113 Wn.2d 35, 41, 775 P.2d 458 (1989); *see also State v. Solomon,* 114 Wn. App. 781, 790, 60 P.3d 1215 (2002) (officer's "unarticulated plan" has no bearing on the custody question).

But Corporal Edje's lack of probable cause distinguishes the present case from *State v. France,* 121 Wn. App. 394, 88 P.3d 1003 (2004). As Mylan correctly notes, in that case, "police had probable cause to arrest France." Brief at 23. The glaring distinction between *France* and the present case is that there the officer "told him that there was an alleged domestic dispute and that they "needed to clear it up" before France would be free to

leave." *France,* 121 Wn. App. at 300-400 (page break omitted). When a suspect is told by a police officer that he cannot leave, the objective test is met and a reasonable person would not believe he was free to leave.

In *State v. Bower,* 73 Wn.2d 634, 440 P.2d 167 (1968). Police investigating an armed robbery had associated Bower's car to the scene. 73 Wn.2d at 637. With no additional information about Bower, detectives went to Bower's residence and spoke with him. *Bower,* 73 Wn.2d at 637-38. Bower agreed with the request of the detectives to go to the station and submit to a polygraph. Id. Further conversation ensued on the trip, including Bower changing his story as to the location of his car at the time of the robbery. Id. Bower was then read his rights and eventually fully confessed in writing. *Bower,* 73 Wn.2d at 639.

The Supreme Court first held that Bower's post-*Miranda* confession was properly admitted at trial. *Bower,* 73 Wn.2d at

642. Further, the Court held that the statements made at Bower's home and during the trip to the police station were "properly admitted. . . as admissions against interest." The Court reasoned that

> these statements were voluntarily made by the defendant while the investigation was in an investigatory stage before reaching its accusatory phase, and during a time when the defendant was not in custody.

Bower, 73 Wn.2d at 642. Thus, even when police take a person from his home to the police station, their conversations remain voluntary, and need not be preceded by *Miranda* warnings, until the investigation ripens into accusation.

The present case is like *Bower.* Neither Corporal Edje nor Officer Chesney asked Mylan to do something like ride in a police car back to the store for an identification. Corporal Edje was hailed by Mylan. RP 8. And Corporal Edje did not restrain, detained, or frisk Mylan. The two conversed in an investigative, not an accusatory, setting. Mylan's statements to Officer Chesney similarly served investigation of the alleged incident

and the lack of restraint or other coercion still obtained during the conversation. Mylan was not in custody when he conversed with the police. The trial court properly admitted his statements.

B. THE EVIDENCE WAS SUFFICIENT TO PROVE A TRUE THREAT.

Mylan claims that the evidence is insufficient to support the conviction for harassment. Specifically, Mylan claims that the state failed to prove a "threat" as that term is constitutionally defined, that is, failed to prove a "true threat." Taking the context of the threats in a light most favorable to the state, with appropriate deference to the trier of fact, the evidence is sufficient.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. See *State v. Green*, 94 Wn.2d 216,

220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Where, as here, the sufficiency of the evidence to establish a "true threat" is challenged, reviewing courts

> look carefully at context and independently assess whether a statement in fact falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech.

State v. D.R.C, 13 Wn. App.2d 818, 825, 467 P.3d 994 (2020) (internal quotation omitted), *quoting State v. Kilburn,* 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). But the reasonableness of fear is a

question left to the trier of fact and not a point requiring heightened scrutiny on review. *See State v. Trey M.*, 186 Wn.2d 884, 905-06, 383 P.3d 474 (2016)(En Banc).

In relevant part, a person is guilty of harassment if that person knowingly threatens "[t]o cause bodily injury immediately or in the future to the person threatened or to any other person." RCW 9A.46.020(1)(a)(i). The charge is a felony if a knowing threat is "by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii). Further, "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b).

The jury was instructed that

> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than something said in jest or idle talk.

CP 131 (instruction no. 17). Thus the jury is instructed on the

constitutional requirement of a "true threat." *See State v. Allen,* 176 Wn.2d 611, 626, 294 P.3d 679 (2013)(En Banc). In the elemental instruction, the jury was instructed that it had to find beyond a reasonable doubt the element that the victim was placed "in reasonable fear that the threat to kill would be carried out." CP 134 (instruction no. 20).

The "true threat" definition need not appear in the elemental instruction. *Allen,* 176 Wn.2d at 630. The constitutionally required definition of "threat" is not an element-- "Definitions are not transformed into essential elements even if they must ultimately be proved at trial to obtain a conviction." *State v. Peters,* 17 Wn. App.2d 522, 532-33, 486 P.3d 925 (2021), *citing Allen*, *supra*, 176 Wn.2d at 626-30; *see also State v. D.R.C.,* 13 Wn. App.2d 818, 825, 467 P.3d 994 (2020).

The correct instruction given defines an objective test. *State v. Trey M.,* 186 Wn.2d 884, 893-94, 383 P.3d 474 (2016)(En Banc). This because

> the First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat, and that the State need not prove such intent.

Trey M., 186 Wn.2d at 894-95 (page break omitted).

The defendant's demeanor is an important factor in distinguishing a "true threat" from hyperbole or joking speech. *See State v. Trey M., supra,* 186 Wn.2d at 907. The reaction of the intended victim informs the question

> An audience member's actual reactions are often typical of what would be expected and therefore provide a guide for what reaction a reasonable speaker under the circumstances would have foreseen.

State v. D.R.C., 13 Wn. App.2d at 826. In *State v. Schaler,* the careful and independent review of the evidence establishing a "true threat" included the victim's assessment that Schaler's "demeanor did not suggest. . .that his words were idle talk or a joke." 169 Wn.2d 274, 291, 236 P.3d 858 (2010).

To recount the core facts, victim Hamilton-Ross reported that he was engaged in a "big shouting match" with Mylan. RP 306. Mylan stood just in front of him and, among other things,

said “Fuck you, you nigger. I’ll kill you. I just got out of jail I’m not scared to go back. I’ll kill you right now.” Id. This threat caused Mr. Hamilton-Ross’ coworker to call 911and Hamilton-Ross to push his “panic button.” Id.

The threats to kill were repeated “[d]ozens of times” along with “I’m not scared to go back to jail.” RP 307. Mr. Hamilton-Ross “started to get really scared.” Id. Then, after leaving, Mylan returns doing “laps around the store” banging on things and yelling that he would kill Mr. Hamilton-Ross, his co-worker, and threatening other customers. RP 309. Now, Mr. Hamilton-Ross “”didn’t feel safe anymore, and I knew he was coming for me.” RP 311. Mylan seemed angry enough to hurt or kill Mr. Hamilton-Ross. RP 312.

Officer Chesney described that at the scene Mr. Hamilton-Ross “seemed frightened, nervous, yeah. A little bit worked up, like upset like something had -- something traumatic had occurred to him. He seemed pretty upset.” RP 293.

Ms. Siva, the 911 caller in the bathroom, described that she had heard threats to kill. She was too afraid to come out of the bathroom because of Mylan's behavior and threats.

The circumstances and context of Mylan's threats show that a reasonable speaker in his position would foresee that his words would be interpreted as a serious expression intent to carry out the threat. Mylan's demeanor is described as angry enough to kill the victim. This anger was emphasized by Mylan's return to the store where the angry threats continued accompanied by menacing physical behavior. Mr. Hamilton-Ross' report of fear is not unreasonable under the circumstances.

In any light, there was more than adequate proof of "true threat." Mr. Hamilton-Ross' reasonable reactions need not be "taken to be true," they are uncontested. This issue fails.

C. THE ISSUE OF THE ADMISSIBILITY OF MYLAN'S STATEMENTS REGARDING PREVIOUS TIME IN PRISON WAS NOT PRESERVED AND IF JUSTICIABLE WAS PROPERLY ADMITTED.

Mylan claims that the trial court erred when it admitted Officer Chesney's body cam footage in which he repeatedly refers to time in prison. Mylan claims that this evidence violates ER 404(b). But Mylan conceded admissibility in the trial court. Even so, the trial court viewed the evidence, balanced probative value against prejudice, and properly admitted the evidence.

A trial court's evidentiary decisions are reviewed for abuse of discretion. *State v. Sanjurjo-Bloom*, 16 Wn.App.2d 120479 P.3d 1195 (2021), *citing State v. Powel*l, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists if the trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. Id. A trial court's assessment of prejudicial effect of evidence is given deference on review. *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009).

1. The issue is not preserved because Mylan conceded admissibility in the trial court.

The erroneous admission of ER 404(b) evidence does not raise a constitutional issue. *Powell,* 166 Wn.2d at 84*; State v. Jackson*, 102 Wn.2d 689, 692, 689 P.2d 76 (1984). "The admission of evidence on an uncontested matter is not prejudicial error." *Powell,* 166 Wn.2d at 84*, quoting Brown v. Quick Mix Co.*, 75 Wn.2d 833, 839, 454 P.2d 205 (1969). In short,

> recent Washington decisions unanimously hold that a reviewing court will not reverse a trial court's evidentiary decision when a defendant objects on appeal to the decision on an evidentiary ground not raised before the trial court.

State v. Kelly, 19 Wn. App.2d 434, ¶ 80, 496 P.3d 1222 (2021) *citing Powell, supra.* Mylan was required to preserve the present issue by objection below; he did not.

In fact, the defense conceded that the excerpt was "admissible evidence" but asked for redaction of portions of it. RP 69-70. The defense conceded that Mylan's communication of the prison information to the victims would be admissible on

the issue of reasonable fear. RP 69. Herein, Mylan admits that the statements to the victims were admissible because relevant to the issue of reasonable fear. Brief at 28. Below, the defense mentioned neither ER 403 nor ER 404(b). *See State v. Yusuf,* 21 Wn. App.2d 960, 972-74, 512 P.3d 915 (2022) (discussing cases where counsels' objections were close enough to preserve 404(b) issue) *review denied* 200 Wn.2d 1011 (2022). When the excerpt was offered, Mylan responded "No objection." RP 297. The issue is not preserved.

2. The trial court properly concluded that the evidence was admissible.

The trial court, hearing no objection from Mylan, nonetheless followed the command of CrR 3.5 and assessed the statements and found that Mylan's "institutionalized" remarks were not "necessarily" relevant but that they were interspersed with the other comments that, the trial court ruled, were relevant. RP 70-71. The trial court considered whether the prejudice outweighed the probative value of the relevant portions. RP 71.

The balance favored admissibility. Id. Since Mylan did not contest this balancing, "that the probative value of [Mylan's] testimony outweighed its prejudicial effect was an uncontested issue." *Powell,* 166 Wn.2d at 85 (alteration added).

It was correctly anticipated that the testimony of the victim would be that Mylan's threats included various references to his having just gotten out of jail or his not being afraid to go back to jail again if he hurt or killed Mr. Hamilton-Ross. Mylan communicated that he was unafraid of the consequences of killing the man. The jail remarks were integral to the threat, in fact intending to inform the victim of his criminal propensity in order to drive home that Mylan is a dangerous person whose threats should be seriously taken. The remarks are clearly relevant and admissible on the question of reasonable fear. ER 401.

In the body cam excerpt, Mylan simply continues in the same vein. At this point, the jury knows of his admission of prior

incarceration by relevant, admissible evidence. ER 404(b) evidence is not admissible to show the defendant's propensity to commit the crime charged but is admissible "for other purposes like demonstrating intent so long as the probative value outweighs its prejudicial effect." *Sate v. Powell,* 166 Wn.2d at 81. Further,

> Courts may admit ER 404(b) evidence to prove the defendant's state of mind where the misconduct comes to bear on the defendant's mental state at the time of the alleged offense.

Id.

In the present case, the state had to prove a "true threat." This proof requires a showing that Mylan, or a reasonable person in his position, "would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than something said in jest or idle talk." Mylan's reference to his prison time during the crime accentuated the threat, it was proof he was unafraid to execute the threat. Mylan's statements to police tend to make this proposition more

likely than not. ER 401.

There was no objection below—indeed the defense conceded that the evidence was admissible. The issue should not be reviewed. RAP 2.5. Moreover, if reviewed, the evidence was cumulative of admissible evidence and was directly relevant to the issues of true threat and reasonable fear. There was no abuse of discretion.

D. MYLAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mylan claims that counsel was constitutionally ineffective for failing to request a limiting instruction to explain evidence of his time in prison.

As noted above, the trial court's balancing of probative value against prejudicial effect was uncontested below. Moreover, that balancing was done after the defense had properly conceded that the evidence was admissible. As seen, Mylan intended that the prison remarks serve to underline the earnest nature of the threats. So viewed, Mylan himself wanted the

remarks to be taken as true and his past incarceration to warn the victim of the danger. RP 380 ("I will fucking kill you. I've been to prison."). The remarks were admitted as probative of an element of the offense, reasonable fear, and probative of the constitutionally required showing of true threat.

These are the circumstances that counsel faced. The complained-of evidence was probative of the proposition the state had to prove. The prison remarks were part of the threats and repetition of the same to law enforcement made more likely the reports of the victims.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); see also *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry

need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to

matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

On the issue of deficient performance, Mylan faults counsel because he could have asked for a limiting instruction and did not. Such an instruction would have been given upon request. *See State v. Smith,* 13 Wn. App.2d 420, ¶81 464 P.3d 554 (2020) *review denied* 196 Wn.2d 1014 (2020); *State v. Dow,* 162 Wn. App. 324, 333, 253 P.3d 476 (2011)(if criminal history comes in, ER 609, limiting instruction must be given upon request.). But on an issue that goes to trial strategy the question is more, by his lights at the time, should counsel have sought the instruction.

Here, the nature of the actual crime or crimes that resulted in Mylan's previous incarceration is unknown. Mylan never speaks of a particular crime or crimes. On appeal, Mylan proposes no limiting instruction. Under the circumstances perhaps

> Evidence has been received that Mr. Mylan was previously incarcerated for the other crimes. This evidence may be considered by you on the question whether the victim's fear was reasonable and whether the statements made constitute a "true threat" as that phrase is defined in these instructions. You may not consider this evidence for any other purpose.

This or some variation would need to get to the point and advise that the jury could not consider prior criminal behavior in deciding the present case. Defense counsel, in the position he was in, would sense that that instruction would serve to underline that aspect of the case in a manner unhelpful to Mylan. In these circumstances, "We can presume counsel did not request limiting instructions to avoid reemphasizing damaging evidence." *Dow, supra,* 162 Wn. App. at 335 More, "the burden is on the defendant to rebut this presumption." *State v. Smith, supra,* 13 Wn. App.2d at ¶81.

Moreover, part of the position counsel was in was his understanding that because the same statements directed at the victims were admissible, the repetition of it to the police could cause little additional prejudice. The inference to be bottomed

was that the jail remarks were asserted as part of the threats. That Mylan said the same to the police would serve only, as argued, to make the fact that he said those things to the clerk more likely than not. Here, since Mylan's prison remarks during the incident were properly admitted, it is unlikely that the repetition of the same to the police would have changed the result of the trial.

Defendants are not guaranteed "successful assistance of counsel." *Dow,* 162 Wn. App. at 336. In this case, the defendant's words constituted the crime of conviction. Knowing this, counsel reasonably chose not to reemphasize that those words included reference to time in jail. Here, Mylan fails in his burden to rebut the presumption that counsel made a strategic decision to avoid drawing more attention to the evidence. Neither deficient performance nor resulting prejudice is manifest. This issue fails.

E. THE 911 CALLS WERE PROPERLY ADMITTED AS EXCEPTIONS TO HEARSAY AND NOT IN VIOLATION OF CONFRONTATION CLAUSE.

Mylan claims that the admission of two 911 calls, without live testimony from the declarants, violated the confrontation clauses of the United States and Washington constitutions. First, Mylan argues that the statements made were testimonial and as such cannot be admitted without cross examination. Second, on the assumption that the statements were testimonial, Mylan argues that the state must show "beyond a reasonable doubt" that the error of admission did not prejudice Mylan's case.

As seen, the state advanced an offer of proof arguing for the admission of the recordings. The trial court listened to the two recordings in court. RP 55. The state conceded that the statements were hearsay because offered for the truth of the matters asserted.[4] RP 55. Mylan objected, highlighting that the

[4] It is noted that Mylan can be heard on the recordings. His statements there are admissions under ER 801 and are not

statements were not cross examined, citing *Crawford v. Washington.* RP 61.

The trial court found that the statements were hearsay but subject to exception as present sense impression. RP 63. The trial court found that the statements were "describing events as they were actually occurring versus being past events. . ." RP 64. The trial court found that the statements described an "ongoing emergency." Id. The trial court found that, objectively viewed, any questions and answers on the call "were necessary to resolve the present emergency. . ." RP 65. And, finally, the trial court found that the tenor of the calls lacked the formality of an investigative interview by police. Id. The trial court concluded that admission of the recordings did not violate the confrontation clause. RP 65-66.

Again, a trial court's evidentiary decisions are reviewed for abuse of discretion. *State v. Sanjurjo-Bloom*, 16 Wn.App.2d

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hearsay.

120479 P.3d 1195 (2021), *citing State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists if the trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. Id. A trial court's assessment of prejudicial effect of evidence is given deference on review. *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009).

ER 803(a)(1) provides that "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule "even though the declarant is unavailable as a witness." Mylan does not challenge the trial court's evidentiary ruling that this hearsay exception applied to the offered 911 tapes.

A confrontation clause challenge is reviewed de novo. *State v. Koslowski,* 166 Wn.2d 409, 417, 209 P.3d 479 (2009); U.S. Const. amed. VI.; Wash. Const. Art. I, §19. The *Koslowski*

Court, following United States Supreme Court cases, noted that "not all police interrogation yields testimonial statements." *Koslowski,* 166 Wn.2d at 418; *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The well-established distinction is whether or not the statements are "testimonial."

The distinction is established by objective evaluation of the circumstances in which the offered statements are received. *State v. Scanlon,* 193 Wn.2d 753, 763, 445 P.3d 960 (2019). Thus,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Scanlan, 193 Wn.2d at 763, *quoting Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

A four factor "primary purpose" test is used to

> determine whether an out-of-court statement is testimonial under *Davis*: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation."

State v. Beadle, 173 Wn.2d 97, 108, 265 P.3d 863 (2011) (En Banc). Under the primary purpose test "the statements and actions of both the declarant and interrogators are relevant to this inquiry." *Scanlan,* 193 Wn.2d at 763; *Beadle,* 173 Wn.2d at 109.

In the present case, the primary purpose of the 911 conversations was to "enable police assistance to meet an ongoing emergency." *State v. Scanlon quoting Davis v. Washington, supra.* Here, the timing is obvious: Mylan can be heard screaming at the store clerk in one 911 call and the other caller is reporting that at that time because of the threats to kill she is afraid to leave the bathroom. Second, the "threat of harm" prong is, again, obvious: the crime is threatening harm and Mylan is doing just that at the time of the call. Third, questioning of the callers by the 911 operator was no more than information,

seeking the nature of the on-going incident, location of the incident, and descriptions of those involved. And, forth, as with the third factor, the 911 operator sought the who, what, when, and where of the incident; the questions did not amount to a formal interrogation.

The *Davis* Court observed that

> at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

547 U.S. at 827. 911 calls by their nature are not "ordinarily" testimonial. The present calls merely described the current circumstances requiring police assistance; the callers were not testifying. *Davis,* 547 U.S. at 828. The admission of the calls did not violated the Confrontation Clause.

F. NO ERRORS ACCUMLATE IN THE MATTER; MYLAN HAD A FAIR TRIAL.

The cumulative effects of trial court errors may require reversal, even if each error examined on its own would otherwise

be considered harmless. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). To determine whether cumulative error exists, the Court examines the nature of the error: multiple constitutional errors are more likely to accumulate to cumulative error than multiple nonconstitutional errors. *Russell,* 125 Wn.2d at 94. But if "no prejudicial error was found there can be no application of the cumulative error doctrine." *State v. Bradbury*, 38 Wn. App. 367, 375, 685 P.2d 623 (1984). Some errors, individually, are harmless because of the weight of the other evidence presented at trial. *See Russell*, 125 Wn.2d at 93-94. "[E]rror without prejudice is not grounds for reversal," and, thus, absent prejudice, cannot accumulate into cumulative error. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

In the present case, there are no errors that prejudiced Mylan' right to a fair trial. Moreover, if it was error to admit the reports of Mylan's crime to 911, little prejudice resulted because of the same admissible testimony by the victim. If the police

body cam was not admitted, the evidence of guilt is still sufficient; again, prejudice is not shown. The evidence of the words Mylan used to commit the crime was unchallenged by Mylan. Thus the evidence against him was overwhelming. Mylan fails top prove error or error that was sufficiently prejudicial to warrant reversal in face of uncontroverted evidence of guilt. This issue fails.

G. THE SCRIVENER'S ERROR SHOULD BE CORRECTED.

Mylan correctly recites the problem with the offender score of 11 that appears on the face of the judgment and sentence. The state conceded at sentencing that it should be a 10. The trial court agreed with a 10 and accordingly proceeded. Should Mylan have further problems in the future, the 11 could well cause confusion. This scrivener's error should be corrected.

IV. CONCLUSION

For the foregoing reasons, Mylan's conviction and

sentence should be affirmed.

V. CERTIFICATION

This document contains 7267 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED February 28, 2023.

Respectfully submitted,

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